IN THE

Supreme Court of the United States

October Term, 1962

Nos. ~~944, 945,~~ 946, 979
108 109, 110 125

INTERSTATE COMMERCE COMMISSION,
Appellant in No. 944,
SEA-LAND SERVICE, INC.,
Appellant in No. 945,
SEATRAIN LINES, INC.,
Appellant in No. 946,
UNITED STATES OF AMERICA,
Appellant in No. 979,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, et al.,
Appellees.

On Appeal From the United States District Court of the District of Connecticut

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph (1)(c) of the Revised Rules of this Court, the Appellee-Railroads move that the judgment of the district court be affirmed on the ground that the questions raised by the Appellants are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

There are involved four direct appeals, one by the Interstate Commerce Commission (No. 944), one by Sea-Land Service, Inc. [Pan-Atlantic Steamship Corporation in the proceedings before the commission] (No. 945), one by Seatrain Lines, Inc. (No. 946), and one by the United States (No. 979), from a judgment of a statutory three-judge district court entered January 8, 1962.[1] In that judgment the court below set aside and vacated, in accordance with its opinion in *New York, New Haven and Hartford R. Co. v. United States*, 199 F. Supp. 635 (D. Conn. 1961),[2] a report and orders of the commission in a proceeding known as *Commodities—Pan-Atlantic Steamship Corporation*, 313 I. C. C. 23 (1960)[3] and enjoined the commission from enforcing them "without prejudice to such further proceedings as the Commission may deem appropriate".

The opinion of the court below describes fully and adequately the rates which were before the commission for determination as to their lawfulness. As the court noted, when Sea-Land instituted its container service in 1957 between the east coast and the south and the southwest, it offered the shipping public the opportunity to move freight over water routes in containers which, when fastened to wheels, become the equivalent of the trailers used by over-the-road motor carriers. This was a new and improved type of transportation. For this new service which from a quality standpoint is in many ways equal to motor common carrier service, Sea-Land proposed a line of pricing below the railroads' boxcar rates.

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1. Printed in full in Appendix B of the Commission's Jurisdictional Statement beginning at page 51 thereof.

2. Printed in full in Appendix A of the Commission's Jurisdictional Statement beginning at page 25 thereof.

3. The report of the commission is printed in full in Appendix C of the Commission's Jurisdictional Statement beginning at page 53 thereof.

The railroads were convinced that if Sea-Land's rates became effective their ability to compete by the use of conventional boxcar service would be impaired since Sea-Land would be offering to the shippers many service features at the line-haul rate which would result in additional costs if rail transportation were used. For example, the shippers using rail boxcars must, in addition to the line-haul rate, bear the cost of bracing and blocking the lading, the cost of draying the freight to a public siding if they are without a private siding, and the cost of loading and unloading the freight into and out of the cars. None of these extra expenses are incurred when Sea-Land service is used. Since the railroads believed Sea-Land was offering service superior to rail boxcar service at lower prices, they asked the commission to investigate the lawfulness of the Sea-Land rates. Some 700 of that carrier's rates were placed under investigation. With a few scattered exceptions all of these reduced Sea-Land rates are presently in effect.

The railroads, after considerable study which included surveys of their patrons, concluded that their trailer-on-flat-car service (TOFC) which, like Sea-Land service, offers the shippers transportation in highway trailers, with the only difference being that in one instance the inter-city movement of the trailers is on a ship and in the other on a flat-car, was substantially identical to Sea-Land from the service standpoint. Therefore, in an effort to meet the new form of competition, the railroads proposed, as a pilot pricing experiment, reduced TOFC rates for 66 movements [4] on the same level as the comparable Sea-Land rates. These rates, at the request of Sea-Land, were suspended (i.e., not permitted to become effective), and placed under investigation as to their lawfulness. They are not yet in effect.

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4. A movement in this instance refers to the point-to-point transportation of a specific commodity at a rate stated in cents per 100 pounds.

While the commission was considering the lawfulness of the 700 Sea-Land rates and the 66 TOFC rail rates in what amounted to a consolidated proceeding, Section 15a(3) of the Interstate Commerce Act,[5] incorporating a new rule of rate-making for inter-mode competition, was enacted. Thus, the question before the commission was whether under this new rule of rate-making the involved rates were lawful. It was the position of the railroads that the rates of either mode which would provide revenues in excess of that mode's cost of providing service should be found lawful. The commission, as the court below noted, found that virtually all of the Sea-Land and TOFC rates were compensatory, that is, they would produce revenues in excess of the costs of furnishing service. But without regard to this finding the commission concluded that while the Sea-Land rates were lawful the TOFC rates were not (199 F. Supp. 638, 639).

The only basis used by the commission in holding the TOFC rates unlawful was, that unless Sea-Land was afforded the advantage of an artificial pricing differential in its favor, both with respect to the TOFC rates and the rail boxcar rates, it would lose traffic to the railroads thereby impairing its ability to continue in the trade (199 F. Supp. 641). To protect Sea-Land's traffic from fair price competition, the commission prescribed a 6 per cent differential in Sea-Land's favor with respect to the TOFC rates and stated that, compared with the rail boxcar rates, the differential should be "somewhat less than 6 per cent".[6]

The commission made it clear beyond all doubt that the condemnation of the rail rates was not based upon any finding that Sea-Land enjoyed an inherent advantage of lower costs than the railroads. Further, the commission stated that it could not determine whether the railroads or Sea-Land had the economic advantage of being the lower

5. 49 U. S. C. § 15a(3).

6. Commission's Jurisdictional Statement at p. 97.

cost agency since on the record Sea-Land, for some of the movements involved, appeared to have lower costs and, in others, the railroads' costs appeared to be lower.[7] It is also noteworthy that the commission did not find that the rail rates were unlawful for any reason other than that they threatened to divert traffic from Sea-Land. For example, there was no finding that the rail rates were predatory, that they were a part of a destructive rate war, or that they were the product of an unfair destructive competitive practice, such as an effort to rig the market.

The railroads asked the court below to enjoin the commission's order on the ground that it was in violation of Section 15a(3) of the Interstate Commerce Act. That section, applicable to intermode competitive pricing, after stating the commission shall ". . . consider the facts and circumstances attending the movement of the traffic by carrier or carriers to which the rate is applicable." lays down the following prohibition:

> "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

The court below held that the commission upon its stated basis for its action was "plainly holding up railroad rates 'to protect the traffic' of another mode", and that the national transportation policy did not justify this. Therefore, the court concluded the order of the commission was unlawful and set it aside (199 F. Supp. 639, 640). The court said that Congress in enacting Section 15a(3) evidenced an intention to encourage competition between carriers of different modes, and that pricing reductions of one mode should not be held unlawful merely because they would divert traffic from another mode. This policy should

7. Id. at pp. 90, 91.

be followed by the commission even though the diversion would be so substantial that the continued existence of the other mode would be threatened. It is only ". . . when factors other than the normal incidents of fair competition" intervene that the reference to the national transportation policy permits rates to be pegged (199 F. Supp. 642).

The court in a fairly long *dictum* then went on and suggested that the legislative history of Section 15a(3) indicated that the commission has the power upon an appropriate record to prescribe differentials to protect the inherent low cost advantage of one mode from erosion by pricing reductions of a higher cost mode. But it should be emphasized that while the court said this could be one of the bases for condemning reduced rates certainly the court did not say that this was the only basis (199 F. Supp. 642).

Having indicated that the commission in an appropriate case could hold unlawful reduced pricing which deprives a competing mode of an inherent low cost advantage, the court said that in this instance the commission's report specifically denied that this was its basis for finding the TOFC rates unlawful (199 F. Supp. 641). Further, again by way of *dictum* the court referred to the inadequacies in the commission's report which would have created difficulties had the purpose been to protect an inherent low cost advantage (199 F. Supp. 644).

In summary, the only question before the court below for decision was whether the commission under Section 15a(3) could find unlawful the railroads' TOFC rates, and further require such rates to be pegged 6 per cent higher than the comparable Sea-Land rates, when the sole basis for its action was a finding to the effect that the railroads' parity pricing might divert substantial traffic from Sea-Land and thus might lessen its ability to continue coastwise water operations. This, the court held, could not be

done because of the prohibition in Section 15a(3) that rates of one mode of transportation shall not be held up to any particular level to protect the traffic of another mode. The court's further exposition with respect to the power of the commission to hold unlawful reduced inter-mode competitive pricing to preserve inherent low cost advantages was *dictum* and, at most, advisory to the commission.

ARGUMENT IN SUPPORT OF THE MOTION

There is nothing to be gained by further argument and consideration of this litigation by this Court. Therefore, the judgment of the court below should be affirmed upon this Motion.

The court below—as does this Court—reviewed the commission's orders upon the basis which the commission articulated in support of them, and it was not required to search through the record and the pleadings to ascertain whether another basis, not relied upon by the commission, existed which conceivably could have supported the determination. *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87, 88.[8]

A reading of the commission's report, of the court's analysis of it, and of the four jurisdictional statements presented in the appeals here, compels the conclusion that the commission utilized only one basis in finding unlawful the reduced TOFC pricing. What it did was to find unlawful reduced rail pricing, which was compensatory, non-discriminatory, non-preferential, and, by the usual standards at reasonable levels, for the sole purpose of protecting the traffic of Sea-Land from diversion. This is precisely what Section 15a(3) says the commission shall not do and what the legislative history referred to by the court below indicates that Congress intended the commission should not do.[9]

The court below had no difficulty in deciding that the basis used by the commission was contrary to the statute, and it is most respectfully submitted that this Court should require no further argument to reach the same conclusion.

Congress, in the most straightforward language in Section 15a(3), directs the commission, in considering the lawfulness of inter-mode competitive pricing, not to use its

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8. 199 F. Supp. 646.
9. 199 F. Supp. 642.

minimum rate powers to protect the traffic of one mode from the fair price competition of another. It is only when the price competition involves practices in conflict with the national transportation policy that the commission may intervene to curtail such practices.

The provisions of the national transportation policy relevant to inter-mode pricing require the commission ". . . to recognize and preserve . . . inherent advantages"; ". . . to promote . . . economical, and efficient service and foster sound economic conditions in transportation"; ". . . to encourage the establishment and maintenance of reasonable charges for transportation services"; and to prevent ". . . unfair or destructive competitive practices". The outlawing of fair price competition merely because it will harm another mode of transportation by diverting traffic from it, would be contrary to all of these objectives, and especially is this so where these objectives are appraised in the light of the expressed Congressional mandate to the commission in Section 15a(3) that rates of one mode of transportation ". . . shall not be held up to a particular level to protect the traffic of any other mode . . .". This is essentially what the court below held and any other result would have distorted both the language and the purposes of Section 15a(3), for it must be remembered that the prime objective of the Congress in enacting it was to encourage competition between the different modes.

It is noteworthy that two other three-judge statutory district courts have decided the question which was before the court below in exactly the same way. In *Missouri Pacific Railroad Co. v. United States*, 203 F. Supp. 629 (E. D. Mo. 1962) the commission, relying upon its earlier decision in the *Pan-Atlantic* case, found unlawful railroad pricing because it was at levels lower than motor carriers enjoying some of the involved traffic could profitably maintain. Again the sole basis for the commission's action was its desire to protect the motor carriers from the price com-

petition of the railroads. In holding without dissent that the commission had acted contrary to the prohibition in Section 15a(3), the court said:

> "The resulting amendment was explicit in its prohibition of the 'protective' practices which the Congress attributed to the ICC during the 50's."
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> • • •
>
> "Legislative history so clearly affirms the patent meaning of these words [referring to Section 15a(3)] that it does not merit quotation."
>
> "Yet, despite this amendment and its history, the Commission would drain its strength and negate its effect entirely by grasping the qualifications of 'giving due consideration to the objectives of the national transportation policy', and emphasizing it to the detriment of the directive it merely qualifies." (203 F. Supp. 633, 634)

Another effort by the commission to interfere with fair price competition of the railroads to protect a different mode of transportation was also found unlawful by a three-judge district court without dissent in *Pennsylvania Railroad Co. v. United States,* 202 F. Supp. 584, 586 (E. D. Pa. 1962).

The carefully and thoroughly considered opinions of these two three-judge district courts, each in a different circuit, confirm the soundness of the result of the court below on the only question for decision which was before it, and support the view that there is nothing to be gained by this Court calling for a more extensive presentation of arguments on that question.

In three of the jurisdictional statements that have been submitted in the instant appeals, it is contended that this case should be argued and briefed because the opinion of the court below will have the effect of limiting the commis-

sion's power to find unlawful reducing pricing to those instances where an inherent low cost advantage is being protected. This, it is said, will reduce the commission's role to that "of a mere computer of costs".[10]

These contentions do not correctly characterize what the court below has done. The court, having held that the commission had not used a lawful basis for condemning the railroads' rates, quite understandably did not want to create the impression that it was holding that Section 15a(3) has totally eliminated the commission's power to find unlawful every type of reduced inter-mode competitive pricing. It therefore, in an extended *dictum*, suggested to the commission that it still retains, under some circumstances, considerable power in this field. Since the Supreme Court had held in *Schaeffer Trans. Co. v. United States*, 355 U. S. 83, that the national transportation policy requires the commission to recognize the inherent ability "of one mode to operate with a rate lower than competing types of transportation";[11] and, since the legislative history of Section 15a(3) indicated that the Congress was in strong agreement with this viewpoint,[12] the court below

10. Commission's Jurisdictional Statement at pp. 13-22; Sea-Land's Jurisdictional Statement, p. 8; and Seatrain's Jurisdictional Statement, pp. 9-13. The Jurisdictional Statement of the United States does not contain this argument.

Assuming, contrary to the fact, that the opinion of the court below propounds the proposition that the commission's power to find unlawful reduced inter-mode competitive pricing is limited solely to those instances where it is protecting an established inherent low cost advantage, this proposition would neither be controlling should the commission reopen the proceedings with respect to the instant rates, nor in other proceedings before it involving different rates. The question of whether the commission has power under Section 15a(3) of the Act to protect a low cost advantage was not before the court for decision since the commission had specifically found that it could not determine ". . . where the inherent advantages may lie as to any of the rates in issue" (Commission's Jurisdictional Statement at p. 91).

11. 355 U. S. 91.

12. 199 F. Supp. 642.

noted that the commission has power under the new rule of rate-making to condemn pricing that impairs or destroys an inherent advantage of low cost. While the court below, at considerable length, developed some of the problems that the utilization of such a basis might have occasioned because of the nature of the record before the commission in this instance, there is nothing in the court's detailed analysis to sustain the position that it was holding that this is the exclusive legal basis for condemning reducing pricing.

The language of the court below leading into its discussion of the commission's power to protect an inherent low cost advantage reads:

> "Instead, we think, the differential-prohibition was intended to be qualified only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the 'inherent advantage' of being the low-cost carrier." (199 F. Supp. 642).

From this language it is evident that the court was of the opinion that the reference to the national transportation policy was included to empower the commission to outlaw reduced pricing "when factors other than the normal incidents of fair competition intervene." Among such unfair destructive practices the court included pricing which would erode the inherent low cost advantage of another mode. Later in its opinion the court indicated that another type of unfair destructive competitive practice which could be brought to a halt is the full-fledged rate war which drives rates to excessively low levels (199 F. Supp. 646).

Since all of the court's discussion dealing with the bases, not present in the commission's report, which might be utilized to hold unlawful reduced pricing was *dictum* and

beyond the question before it for decision, it would seem immaterial that the *dictum* did not embrace all of the possible bases which might conceivably exist. And, what is more important from the standpoint of the instant litigation in its present posture before this Court, it would be completely unrealistic to expect this Court by a more extended *dictum* to describe every type of practice which would be proscribed because it constitutes an unfair destructive competitive practice. Rather, because of the complexity that surrounds transportation pricing, it is more realistic to expect this to be developed upon a case-to-case basis.[13]

The jurisdictional statement of the United States (No. 979), unlike the other three, does not seek full briefs and oral arguments primarily for the purpose of having this Court deal with the *dictum* of the court below. Having nothing to say ". . . as to the merits of the decision below", its only basis for seeking a plenary review is that ". . . the President has announced a program which is intended to remedy many of the present inadequacies in the regulation of various modes of transportation".[14] Aside from the fact that this program favors ". . . greater reliance on the forces of competition and less reliance on the restraints of regulation",[15] which is an endorsement of the opinion of the court below, this Court should not be asked to consider all of the possible ramifications of the existing statute affecting inter-mode competitive rates merely be-

13. This process is already taking place. This Court has approved decisions of three-Judge Courts holding that under Section 15a(3) the Commission has power to find that unfair destructive competitive practices exist where the pricing of one mode is a predatory effort to destroy a particular competitor of another mode. See *Luckenbach Steamship Co. v. United States*, 179 F. Supp. 605, 612 (D. Del. 1959), aff. 364 U. S. 280; or where it creates by dependent agreements a monopoly as to a particular segment of traffic. See *New York Central Railroad v. United States*, 194 F. Supp. 947, 950 (S. D. N. Y. 1961), aff. *per curiam* 368 U. S. 349.

14. Jurisdictional Statement of United States at p. 11.

15. Message From the President of the United States, H. Doc. No. 384, 87th Cong., 2d Sess., at p. 3 (April 5, 1962).

cause changes in such law may come before the Congress. This Court is not the forum in which the merits of proposed legislation should be studied. The fact that the Government does not express any disagreement with the decision of the court below on the one question that was before it, lends support to the position that there is no need for this Court to receive briefs and hear arguments on that question.

In summary, the decision of the court below on the question before it, the soundness of which is confirmed by the opinions of two other three-judge district courts without dissent, should be approved by this Court. The contention of three of the appellants that this Court should receive briefs and hear oral arguments to improve the *dictum* of the court below is without merit because, in effect, this is a request that this Court come forth with a different and more extended *dictum*. The request of the Government for plenary consideration of the decision below because the Executive branch is sponsoring a program which, after being fully considered by the Congress might possibly result in the statute involved in this litigation being modified to some unknown extent, is equally without merit.

THE RELIEF REQUESTED

It is most respectfully submitted that neither the issue actually involved, nor the matters referred to by the appellants, are of such substance as to require further argument. The judgment of the court below, therefore, should be affirmed by the granting of this motion.

Respectfully submitted,

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PROOF OF SERVICE

I, Carl Helmetag, Jr., Attorney for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of June, 1962, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellant, United States of America, copies to the Honorable Robert Kennedy, Attorney General of the United States, Department of Justice, Washington 25, D. C., the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., the Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C., and Robert C. Zampano, Esq., United States Attorney for the District of Connecticut, Federal Building, New Haven, Conn.

2. On the Appellant, Interstate Commerce Commission, copies to the Honorable Robert W. Ginnane, its General Counsel, and B. Franklin Taylor, Jr., Esq., its Associate General Counsel.

3. On the Appellant, Sea-Land Service, Inc., copies to its attorneys Warren Price, Jr., Esq., 1000 Vermont Avenue, N. W., Washington 5, D. C., Albert W. Cretella, Esq., 153 Court Street, New Haven 10, Conn., and William H. Armbrecht, Jr., Esq., Merchants National Bank Building, Mobile, Ala. (air mail postage prepaid).

4. On the Appellant, Seatrain Lines, Inc., copies to its attorneys Ralph D. Ray, Esq. and Edmund E. Harvey, Esq., Chadbourne, Parke, Whiteside & Wolff, 25 Broadway, New York 4, N. Y., Morris Tyler, Esq., Gumbart, Corbin, Tyler

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